

KAREN P. HEWITT
United States Attorney
CHRISTINA M. McCALL
Assistant U.S. Attorney
California State Bar No. 234139
Federal Office Building
880 Front Street, Room 6293
San Diego, California 92101-8893
Telephone: (619) 557-6760

Attorneys for Plaintiff
United States of America

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF CALIFORNIA

UNITED STATES OF AMERICA

Plaintiff,

v.

MIGUEL MENDIOLA-MARTINEZ,

Defendant

Criminal Case No. 08CR1169-WQH

Date: September 15, 2008

Time: 9:00 a.m.

**GOVERNMENT'S
SUPPLEMENTAL BRIEF
ADDRESSING MOTION IN LIMINE
TO PRECLUDE INTRODUCTION
OF APPLICATION TO ADJUST
STATUS AND EMPLOYMENT
AUTHORIZATION CARD**

Plaintiff, the UNITED STATES OF AMERICA, by and through its counsel, Karen P. Hewitt, United States Attorney, and Christina McCall, Assistant United States Attorney, hereby files its Supplemental Brief on the topic of precluding introduction of Defendant Miguel Mendiola-Martinez's application to adjust status and temporary employment authorization card. Furthermore, the United States moves to preclude defense counsel from arguing that these two documents transform Defendant from an alien from unlawful status, based upon entry without inspection, to lawful status. This briefing is based upon the files and records of this case, together with the attached Statement of Facts and Memorandum of Points and Authorities.

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I**STATEMENT OF FACTS****A. Defendant's Arrest**

On April 9, 2007, Special Agent Matt Beals of the Bureau of Alcohol, Tobacco and Firearms ("ATF") debriefed a confidential informant about firearms possessed by Defendant, Miguel Mendiola-Martinez. The informant stated that Defendant had purchased at least two firearms from the informant in the past 18 months. The informant identified Defendant from his photograph from the California Department of Motor Vehicles driver's license database. A check of Defendant's criminal and immigration history revealed that he was arrested by the Immigration and Naturalization Service for attempted illegal entry into the United States on April 15, 1999, and expeditiously removed from the country. A check of immigration records revealed that Defendant did not have lawful permission to reenter the United States following his removal.

On March 17, 2008, ATF and Immigration and Customs Enforcement agents interviewed Defendant at his residence, after Defendant waived his Miranda rights. Defendant confirmed that he was unlawfully present in the United States, having illegally entered without inspection after being removed through the United States. But Defendant stated that he had recently obtained an Employment Authorization Card issued by the Department of Homeland Security. Defendant indicated that he applied for permanent resident status in the United States and received a receipt for the application. Subsequent investigation revealed Defendant's application had not been granted, making him illegally present in the United States.

Defendant admitted that he possessed multiple firearms, which he allowed the agents to inspect. Defendant possessed five firearms, and almost 500 rounds of assorted ammunition. The firearms were all manufactured outside of California and traveled in interstate commerce:

Remington, model 700, .30-06 rifle, serial number B6264511

Colt, model Commander, .45 caliber pistol, serial number CJ27643

Ruger, model Vaquero, .45 caliber revolver, serial number 58-29096

Remington, model 700, .30-06 rifle, serial number E6743201

1 Winchester, model 70, .300 caliber rifle, serial number G312564

2 Defendant stated that he never transported or sold firearms in Mexico. Defendant did not answer
3 a question regarding selling firearms in the United States. However, Defendant indicated that he liked
4 to hunt and showed the agent his California hunting license, issued on September 13, 2007. Defendant
5 said that he owned the three rifles for seven years, and that his father-in-law had purchased the rifles for
6 him. Defendant said the two handguns came from a friend that he had not seen for two years. Defendant
7 claimed that friend asked him to hold the firearms for him until the friend returned from Mexico.
8 Agents placed Defendant under arrest for violating 18 U.S.C. 922(g)(5), illegal alien in possession of
9 firearms.

10 **B. Subsequent Investigation**

11 Subsequent investigation revealed that none of the five weapons Defendant possessed were
12 legally purchased by him from a licensed firearms dealer. Four of the firearms were purchased by four
13 different people; the fifth (one of the Remington .30-06 rifles) has no record of a purchaser when traced
14 through federal databases.

15 Agent Beals examined the weapons and determined that they were manufactured in Connecticut,
16 New Hampshire, and New York. This indicates that each of the five firearms in Defendant's possession
17 traveled in interstate commerce.

18 Immigration and Customs Enforcement agents conducted an immigration investigation. They
19 determined that Defendant was arrested twice previously for illegally entering the United States. The
20 first arrest took place at the San Ysidro port of entry on April 15, 1999. On that occasion, Defendant
21 presented a false green card bearing someone else's name and alien number. During the secondary
22 inspection process, Defendant admitted that he was not the rightful owner of the document, and that he
23 lacked permission to lawfully enter the United States. Defendant was expeditiously removed from the
24 United States. One week later, Defendant was arrested on April 22, 1999 by Border Patrol agents five
25 miles east of the Tecate Port of Entry. At that time, Defendant also lacked permission to enter the
26 United States and was removed.

1 In April of 2007, Defendant filed an application for waiver of grounds of inadmissibility, known
2 as an I-212 application for permission to reapply for admission into the United States after deportation
3 or removal. This application has yet to be adjudicated and the waiver has not been granted. Defendant
4 also filed an application to adjust his status to that of a lawful resident, on the basis of his marriage to
5 a United States citizen. The application to adjust status has similarly not been adjudicated or granted.
6 Following the filing of that application, Defendant was issued an Employment Authorization card. This
7 card is clearly labeled “not an entry document.” Defendant was in possession of a temporary social
8 security card that appears to have been issued on August 13, 2007. The social security card is stamped
9 “valid for work only with DHS authorization.”

10 Despite these cards, Defendant had no official permission to enter or reside in the United States.
11 Investigation of Defendant’s Alien file and immigration records indicates that Defendant was present
12 in the United States illegally. Defendant entered without inspection or approval following his 1999
13 removal, making him unlawfully present in this country. Defendant’s own application to adjust status
14 contains several admissions about his unlawful status. [Exhibit 1, Supplement to Form I-485.]

15 II

16 ARGUMENT

17 A. Introduction

18 The United States moves to preclude the introduction of Defendant’s employment authorization
19 card and application to adjust status to a lawful resident. These documents are irrelevant to the question
20 of whether Defendant was illegally or unlawfully present in the United States, and seriously risk
21 confusing the jury.

22 B. Defendant Was Unlawfully Present in the United States

23 The statute that Defendant is charged with violating, 18 U.S.C. § 922(g)(5)(A), does not define
24 the term “illegally or unlawfully in the United States.” “The legislative history [of section 922(g)(5)(A)]
25 is similarly silent” on the definition of what constitutes illegal or unlawful presence in the United States.
26 United States v. Lopez-Perera, 438 F.3d 932, 934 (9th Cir. 2006). The agency charged with
27 administering section 922, ATF, has promulgated a regulation that includes a definition of an alien
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1 illegally or unlawfully in the United States. See 27 C.F.R. § 478.11. [Exhibit 2.] The relevant portion
 2 of the ATF's definition provides: "Aliens who are unlawfully in the United States are not in valid
 3 immigrant, nonimmigrant or parole status. The term includes any alien--(a) who unlawfully entered the
 4 United States without inspection and authorization by an immigration officer and who has not been
 5 paroled into the United States...." Both Lopez-Perera, 438 F.3d 932, and United States v. Ochoa-
 6 Colchado, 541 F.3d 1292 (10th Cir., 2008) recognize that 27 C.F.R. § 478.11 is the starting point for
 7 analyzing the meaning of the phrase "illegally or unlawfully in the United States."

8 Defendant has never been lawfully admitted to the United States. Records show that Defendant
 9 was arrested twice in 1999, illegally crossing the border without inspection, and physically removed
 10 from the country. On one of those occasions, Defendant presented a false identification and was
 11 expeditiously removed. Because of that 1999 incident, Defendant was inadmissible to the United States.
 12 Defendant's own application to adjust status admits that he was "in unlawful immigration status because
 13 [he] entered the United States without inspection or remained in the United States past the expiration
 14 of the period of my lawful admission." [Exhibit 1.]

15 **C. Defendant is Removable, Despite Filing the Application to Adjust Status**

16 Because Defendant entered without inspection, he is removable under 8 U.S.C. §
 17 1182(a)(6)(A)(i), which provides: "An alien present in the United States without being admitted or
 18 paroled, or who arrives in the United States at any time or place other than as designated by the Attorney
 19 General, is inadmissible." [Exhibit 3.] An applicant's status is still "unlawful" until his application for
 20 admission or adjustment of status is adjudicated and it is determined that he is "admissible" and is
 21 "admitted," as that term is defined in the INA. "The terms 'admission' and 'admitted' mean, with respect
 22 to an alien, the lawful entry of the alien into the United States after inspection and authorization by an
 23 immigration officer." 8 U.S.C. §1101(a)(13)(A). [Exhibit 4.]

24 Defendant cites United States v. Revuelta, 109 F.Supp.2d 1170 (N.D. Cal. 2000), for the
 25 proposition that he is not removable, solely because he filed an application to adjust status. This is a
 26 mis-interpretation of Revuelta. In that case, Revuelta moved to dismiss the section 922(g)(5) charges
 27 against him, arguing that filing a form I-485 application to adjust status based upon marriage to a United
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1 States citizen made him not an illegal alien. The district court denied Revuelta's motion to dismiss the
 2 charge, not finding Revuelta's arguments persuasive. The district court in Revuelta considered now-
 3 defunct INS operating instructions that are completely irrelevant to this case. The INS ceased to exist
 4 on March 1, 2003, and Defendant is clearly removable on the basis of 8 U.S.C. § 1182(a)(6)(A)(i), entry
 5 without inspection. Defendant's attempt to twist Revuelta into some sort of bar to removal fails.

6 **D. Possession of a Temporary Work Authorization Card and Application for Residency Do**
 7 **Not Equal Lawful Status**

8 Defendant received an employment authorization document under 8 C.F.R. § 241a.12(c)(9).
 9 That provision of the C.F.R. allows certain aliens to receive employment authorization while their
 10 applications are pending. It does not grant any legal status, whatsoever, to the applicant.

11 Defendant may attempt to argue that his temporary Employment Authorization Document and
 12 application for cancellation of removal and adjustment of status transform his illegal presence in the
 13 United States into lawful residency. As a matter of law, this argument has been rejected.

14 In United States v. Latu, 479 F.3d 1153 (9th Cir. 2007), Latu overstayed his visa and filed a Form
 15 I-485 application for adjustment of status, after marrying a United States citizen. Latu was charged with
 16 illegal possession of a firearm in violation of 18 U.S.C. § 922(g)(5)(A). Id. at 1155. The Ninth Circuit
 17 upheld Latu's conviction on the 922(g)(5)(A) count and "decline[d] Latu's invitation to ... hold[] that
 18 Latu's presence in the United States is deemed lawful" merely because Latu had a pending application
 19 for adjustment of status. Id. at 1158. The opinion stated further, "absent a statute preventing Latu's
 20 removability upon filing of his application for adjustment of status, we can envision no interpretation
 21 that renders Latu's presence anything than 'illegal or unlawful.'" Id. at 1159.

22 Defendant can point to no statute that prevents his removability, because none exists. The whole
 23 purpose of the adjustment of status process is to determine whether an alien is inadmissible or removable
 24 for any reason. DHS could, in theory, issue an employment authorization to Osama Bin Laden if he
 25 applied for adjustment of status on the basis of a marriage to a United States citizen. Once DHS
 26 discovered he was inadmissible as a terrorist, however, DHS would deny his application and put him
 27 in removal proceedings. DHS would never admit Bin Laden, and he would never have any lawful status.

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1 Just because Defendant filed an application to adjust his status, his presence would not be lawful until
2 the application was granted, which it has not been.

3 Similarly, the Tenth Circuit very recently upheld a conviction for violating 18 U.S.C. §
4 922(g)(5)(A) in United States v. Ochoa-Colchado, 521 F.3d 1292 (10th Cir. 2008). Ochoa was a citizen
5 of Mexico who unlawfully entered the United States and was convicted of illegal entry, but was never
6 physically removed from this country. Id. at 1293. Ochoa filed an application for cancellation of
7 removal and adjustment of status, which was pending before an immigration judge during his criminal
8 case. Id. Like Defendant, Ochoa was also granted an employment authorization document that would
9 allow him to work while residing in the United States. Id. Ochoa moved to dismiss the indictment,
10 arguing that he was not in the United States illegally. The Tenth Circuit upheld the conviction,
11 concluding “that Defendant, despite his filing of an application for adjustment of status and receipt of
12 an [employment authorization document] was still ‘illegally or unlawfully in the United States’ for
13 purposes of § 922(g)(5)(A).” Id. at 1298.

14 Other circuits have also suggested the same conclusion. See United States v. Bezargan, 992 F.2d
15 844, 848-49 (9th Cir. 1993); United States v. Lucio, 428 F.3d 519, 520 (5th Cir. 2005). Based upon the
16 Latu and Ochoa decisions, the filing of an application to adjust status and receipt of a temporary
17 employment authorization document do not render an alien’s presence lawful.

18 III

19 CONCLUSION

20 For the reasons detailed above, Defendant should be precluded from introducing evidence of his
21 employment authorization card and application to adjust status, and arguing that those two documents
22 make his presence in this country lawful.

23 DATED: August 19, 2008

Respectfully submitted,

24 KAREN P. HEWITT
United States Attorney

25 /s/ Christina M. McCall

26 CHRISTINA M. McCALL
27 Assistant U.S. Attorney
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UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF CALIFORNIA

UNITED STATES OF AMERICA)

Plaintiff,)

v.)

MIGUEL MENDIOLA-MARTINEZ,)

Defendant.)
_____)

Criminal Case No. 08CR1169-WQH

CERTIFICATE OF SERVICE

IT IS HEREBY CERTIFIED that:

I, CHRISTINA M. McCALL, am a citizen of the United States and am at least eighteen years of age. My business address is 880 Front Street, Room 6293, San Diego, California 92101-8893.

I am not a party to the above-entitled action. I have caused service of **UNITED STATES' SUPPLEMENTAL BRIEF** on the following parties by electronically filing the foregoing with the Clerk of the District Court using its ECF System, which electronically notifies them.

Genaro Lara
Marcel Stewart

I hereby certify that I have caused to be mailed the foregoing, by the United States Postal Service, to the following non-ECF participants on this case:

None

the last known address, at which place there is delivery service of mail from the United States Postal Service.

I declare under penalty of perjury that the foregoing is true and correct.

Executed on August 19, 2008

/s/ Christina M. McCall
CHRISTINA M. McCALL